(14)

Supreme Court, U.S.
FILED
NOV 10 1998
CLERK

No. 98-97

In the Supreme Court of the United States

OCTOBER TERM, 1998

ELOISE ANDERSON, ET AL.,
Petitioners

v.

BRENDA ROE AND ANNA DOE,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA, AND THE STATES OF ALABAMA, FLORIDA, GEORGIA, HAWAII, MARYLAND, MINNESOTA, MONTANA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, RHODE ISLAND AND WASHINGTON IN SUPPORT OF PETITIONERS

BETTY D. MONTGOMERY
Attorney General
JEFFREY S. SUTTON
State Solicitor
State of Ohio

State Office Tower
30 East Broad Street
Columbus, Ohio 43215-3428
(614) 466-3376

D. MICHAEL FISHER
Attorney General
JOHN G. KNORR, III
Chief Deputy Attorney General
Counsel of Record
Commonwealth of Pennsylvania

15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1144

[Additional counsel on inside cover]

31 pp

BILL PRYOR
Attorney General of Alabama
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7300

ROBERT A. BUTTERWORTH
Attorney General of Florida
The Capitol PL-01
Tallahassee, Florida 32399-1050
(850) 414-3300

THURBERT E. BAKER
Attorney General of Georgia
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3300

MARGERY S. BRONSTER
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1500

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6300

HUBERT H. HUMPHREY III
Attorney General of Minnesota
102 State Capitol
Saint Paul, Minnesota 55155
(651) 296-9717

JOSEPH P. MAZUREK
Attorney General of Montana
Justice Building
P.O. Box 201401
Helena, Montana 59620-1401
(406) 444-2026

FRANKIE SUE DEL PAPA
Attorney General of Nevada
100 N. Carson Street
Carson City, Nevada 89701-4717
(702) 687-4170

PHILIP T. MCLAUGHLIN
Attorney General of New Hampshire
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3658

DENNIS C. VACCO
Attorney General of New York
The Capitol
Albany, New York 12224
(518) 474-7330

MICHAEL F. EASLEY
Attorney General of North Carolina
P.O. Box 629
Raleigh, North Carolina 27602
(919) 716-6400

HEIDI HEITKAMP
Attorney General of North Dakota
600 East Boulevard Avenue
Bismarck, North Dakota 58505-2210
(701) 328-2210

JEFFREY B. PINE
Attorney General of Rhode Island
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400

CHRISTINE O. GREGOIRE
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, Washington 98504-0100
(360) 753-6245

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. *Shapiro v. Thompson* Has Proven to Be a Doctrinal Dead End, Unworkable in Practice Because it Is Unsound in Principle 4

A. *Shapiro's* analysis, unbounded by text or tradition, is essentially unprincipled 4

B. *Shapiro's* approach has been undermined by later decisions 11

II. *Shapiro* Continues to Have Deleterious Effects on Government's Efforts to Attack Difficult Social Problems, Especially the Reform of Welfare 13

III. Considerations of Stare Decisis Do Not Weigh Against Overruling *Shapiro* 19

IV. Claims Involving Travel Should Be Measured by the Usual Tools of Constitutional Adjudication: Text and Tradition 20

CONCLUSION 23

TABLE OF AUTHORITIES

Cases **Page**

Agostini v. Felton,
521 U.S. 203, 117 S.Ct. 1997 (1997) 14, 19
Albright v. Oliver,
510 U.S. 266 (1994) 12
Attorney General of New York v. Soto-Lopez,
476 U.S. 898 (1986) 9, 10, 13
Baker v. McCollan,
443 U.S. 137 (1979) 11
Burnet v. Coronado Oil and Gas Co.,
285 U.S. 393 (1932) 19
Califano v. Aznavorian,
439 U.S. 170 (1978) 22
Camps Newfound/Owatonna, Inc. v. Town of Harrison,
520 U.S. 564, 117 S.Ct. 1590 (1997) 20
City of Chicago v. Morales,
687 N.E.2d 53 (Ill. 1997), *cert. granted*, 118 S.Ct. 1510 (1998) 18
Collins v. Harker Heights,
503 U.S. 115 (1992) 12
Crandall v. Nevada,
6 Wall. 35 (1867) 5
Dandridge v. Williams,
397 U.S. 471 (1970) 12, 22
Davis v. Doth,
No. 62-C6-97-010231 (Minn. St. Dist. Ct. July 31, 1998), *appeal filed* (Minn. Ct. App., Nov. 3, 1998) 14, 17
Edwards v. California,
314 U.S. 160 (1941) 5, 6, 20
Graham v. Connor,
490 U.S. 386 (1989) 11, 12
Green v. Anderson, 811 F.Supp. 516 (E.D. Cal. 1993), *aff'd without opinion*, 26 F.3d 95 (9th Cir. 1994), *vacated sub nom. Anderson v. Green*, 513 U.S. 557 (1995) 4
Harris v. McRae,
448 U.S. 297 (1980) 13
Hicks v. Peters,
10 F.Supp.2d 1003 (N.D. Ill. 1998) 14
Hubbard v. United States,
514 U.S. 695 (1995) 20
Kent v. Dulles,
357 U.S. 116 (1958) 5, 22
Lutz v. City of York,
899 F.2d 255 (3d Cir. 1990) 18
Lyng v. Int. Union, United Auto., Aerospace and Agricultural Implement Workers of America,
485 U.S. 360 (1988) 13
Maher v. Roe,
432 U.S. 464 (1977) 13
Maldonado v. Houstoun,
157 F.3d 179, 1998 WL 569359 (3d. Cir. 1998) ... 14
Memorial Hospital v. Maricopa County,
415 U.S. 250 (1974) 7, 9
National Bellas Hess, Inc. v. Department of Revenue of Ill.,
386 U.S. 753 (1967) 21
Nunez v. City of San Diego,
114 F.3d 935 (9th Cir. 1997) 18
Passenger Cases,
7 How. 283 (1849) 4, 5
Paul v. Virginia,
8 Wall. 168 (1868) 5, 6
Payne v. Tennessee,

501 U.S. 808 (1991) 19
Planned Parenthood of Southeastern Pa. v. Casey,
505 U.S. 833 (1992) 20
Quill Corp. v. North Dakota,
504 U.S. 298 (1992) 21
Reno v. Flores,
507 U.S. 292 (1993) 12
Ruffin v. Quasim,
No. C97-5767 FDB (W.D. Wash. Feb. 6, 1998)
(granting preliminary injunction) 14
Sanchez v. Department of Human Services,
314 N.J. Super. 11, 713 A.2d 1056 (1998) 14
Shapiro v. Thompson,
394 U.S. 618 (1969) ..... *passim*
Slaughter-House Cases,
16 Wall. 36 (1872) 5
Smith v. Allwright,
321 U.S. 649 (1944) 19
Sosna v. Iowa,
419 U.S. 393 (1975) 9
Townes v. City of St. Louis,
949 F.Supp. 731 (E.D. Mo. 1996) 18
United States v. Guest,
383 U.S. 745 (1966) 7
Washington v. Glucksberg,
521 U.S. 702, 117 S.Ct. 2258 (1997) 12, 19
Westenfelder v. Ferguson,
998 F.Supp. 146 (D. R.I. 1998) (granting preliminary injunction), *appeal docketed*, No. 98-1431 (1st Cir. May 14, 1998) 14
Whitley v. Albers,
475 U.S. 312 (1986) 11

Statutes

27 Hen. 8, ch. 25 (1535) (Eng.) 7
42 U.S.C. § 608(a)(7) 17
Minn. Laws 1997, c. 162, art. 4, § 3 16
Minn. Laws 1997, c. 203, art. 1 and 12 16
Minn. Laws 1997, c. 85, art. 1, § 64 17
Minn. Stat. Ann., §§ 256J.01 *et seq.* 16
Personal Responsibility and Work Opportunity
Reconciliation Act of 1996, Pub. L. No. 104-93,
110 Stat. 2105 (1996) 1, 15

Constitutional Provisions

U.S. Const., Art. I, § 8, cl. 3
(Commerce Clause) 5, 6, 20, 21
U.S. Const., Art. IV, § 2, cl. 1
(Privileges and Immunities Clause) 5, 6, 21
U.S. Const., Amend. IV 11, 22
U.S. Const., Amend V (Due Process Clause) 5, 22
U.S. Const., Amend. VIII 11
U.S. Const., Amend. XIV, § 1
(Due Process Clause) 21
U.S. Const., Amend. XIV, § 1
(Equal Protection Clause) 6

Other Authorities

Buckley & Brinig, *Welfare Magnets: The Race to the Top*, 5 Sup. Ct. Econ. Rev. 141 (1997) .. 15, 16
Cardozo, *The Nature of the Judicial Process* (1921) 19
H.R. Rep. No. 651,
104th Cong., 2nd Sess. (1996) 15, 16

Loffredo, *"If You Ain't Got the Do, Re, Mi": The Commerce Clause and State Residence Restrictions on Welfare*, 11 Yale L. & Pol'y Rev. 147 (1993) 7
McCoy, *Recent Equal Protection Decisions — Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 Vand. L. R. 987 (1975) 10
Peterson, *Devolution's Price*, 14 Yale L. & Pol'y Rev. 111 (1996) 16, 17, 18
Quigley, *Backwards Into the Future: How Welfare Changes in the Millennium Resemble English Poor Laws of the Middle Ages*, 9 Stan. L. & Pol'y Rev. 101 (1998) 7
Sullivan, *Unconstitutional Conditions*, 102 Harv. L. R. 1414 (1989) 10, 11
Zubler, *The Right to Migrate and Welfare Reform: Time for* Shapiro v. Thompson *to Take a Hike*, 31 Val. U. L. R. 893 (1997) 10

INTEREST OF AMICI

The "right-to-travel" doctrine announced by the Court in *Shapiro v. Thompson*, 394 U.S. 618 (1969), has subjected the *amici* States to unpredictable and ad hoc restrictions in discharging their responsibilities to their inhabitants, especially, but not only, in the area of welfare benefits.

The *amici* States, like California, are responsible for administering, within their respective jurisdictions, the cash and non-cash assistance programs authorized by the federally-funded Temporary Assistance to Needy Families program. *See* the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (1996) ("Personal Responsibility Act"). Some of the *amici*, responding to Congress' invitation in the Personal Responsibility Act, have adopted welfare residency rules similar to California's; many of these rules have already been struck down by courts relying on *Shapiro*.

All of the *amici* have an interest in encouraging state experimentation and innovation to attack the seemingly intractable problems of poverty, and especially in encouraging approaches which encourage self-support rather than continued dependency on the part of welfare recipients. The *amici* therefore have a substantial interest in the fate of the specific provision of welfare law challenged in this case.

Shapiro's effects, however, have not been limited to the welfare area. *Shapiro* has also fueled attacks, sometimes successful, on other measures adopted by States and their subdivisions under their general police powers; these include measures to curb the problems of gang violence and juvenile crime such as anti-loitering ordinances, anti-cruising ordinances

and juvenile curfews. The *amici* have a substantial interest in being able to address such issues unhampered by *Shapiro's* unpredictable analysis.

SUMMARY OF ARGUMENT

The Court should reconsider and overrule *Shapiro v. Thompson*, 394 U.S. 618 (1969), in which the Court struck down welfare residency requirements as violative of the Equal Protection Clause. In *Shapiro*, the Court first asserted the existence of a "right to travel interstate" which is "fundamental" but unconnected to any particular constitutional provision; and held that any classification that "penalized" the exercise of this right would have to be justified by a compelling governmental interest. The Court then held that a durational residency requirement was such a "penalty," and dismissed as "impermissible" government's interest in discouraging migration solely for the purpose of obtaining higher welfare benefits.

1. *Shapiro's* approach to constitutional adjudication is an isolated anomaly, inconsistent with the cases that came before and after. Before *Shapiro*, the Court had repeatedly upheld claims related to travel, but almost invariably had grounded its holdings in specific constitutional provisions. Since *Shapiro*, the Court has repeatedly sought to avoid the judicial creation of indeterminate, open-ended "rights" by stressing the importance of constitutional text, historical practice and legal tradition in constitutional adjudication. In addition, the Court has repeatedly declined to extend *Shapiro's* "penalty" analysis, and its accompanying strict scrutiny, to similar situations, deferring instead to legislative judgments. *Shapiro* has thus proven doctrinally barren, living on as "a mere survivor of obsolete constitutional thinking."

2. Nevertheless, the ill effects of *Shapiro* continue. Congress authorized the States to adopt "two-tier" residency schemes like California's in order to encourage the States to adopt innovative approaches to welfare, unhampered by the fear that they might attract additional migrants who would imperil the viability of the very programs which had attracted them. Lower courts, however, have consistently relied on *Shapiro's* analysis to strike down "two-tier" residency schemes (even though those schemes differ significantly from those struck down in *Shapiro*). *Shapiro* is thus effectively discouraging the State experimentation and innovation which Congress believes is essential to the reform of the welfare system; and it may well be that, over the years, *Shapiro* has contributed to a "race to the bottom" as each State in turn cuts welfare benefits to avoid attracting welfare recipients. *Shapiro's* open-ended approach has also encouraged litigants in making "right-to-travel" attacks on such measures as juvenile curfews and anti-cruising ordinances.

3. *Stare decisis* should not stand in the way of *Shapiro's* demise. The Court has never hesitated to correct its own errors on constitutional matters because that is the only way, short of amending the Constitution, that they can be corrected. Nor is *Shapiro* the sort of decision around which significant reliance interests have clustered.

4. As the Court's pre-*Shapiro* decisions show, the text of the Constitution provides ample protection against State interference with travel. The Court should make clear that claims involving travel must be measured against specific constitutional provisions, and not against some generic "right to travel." The Court should also make clear that governments at both the State and federal levels have legitimate interests in discouraging welfare recipients from migrating in search of higher benefits.

ARGUMENT

The Court of Appeals, in holding that California's durational residency statute is likely unconstitutional, relied primarily on *Shapiro v. Thompson*, 394 U.S. 618 (1969) and its progeny.[1] The *amici* States agree with the petitioners that, properly understood, the *Shapiro* line of cases does not compel this result. Nevertheless, the fact remains that *Shapiro* is a deeply flawed decision, and we submit that the time has come for the Court to reconsider and overrule it.

I. *Shapiro v. Thompson* Has Proven to Be a Doctrinal Dead End, Unworkable in Practice Because it Is Unsound in Principle.

A. *Shapiro's* analysis, unbounded by text or tradition, is essentially unprincipled.

Before *Shapiro*, the Court had long held that the Constitution protects travel into, out of, and between the States. Thus, in the *Passenger Cases*, 7 How. 283 (1849), the Court struck down as unconstitutional state taxes on passengers entering the ports of Boston and New York from foreign ports. Chief Justice Taney dissented, but in a now-classic statement, expressed his view that no such taxes could be laid upon American citizens coming from the ports of other States:

[1]Neither the Court of Appeals nor the District Court discussed the merits at length. Rather, both courts invoked their earlier decisions in *Green v. Anderson*, 811 F.Supp. 516 (E.D. Cal. 1993), *aff'd without opinion*, 26 F.3d 95 (9th Cir. 1994), *vacated sub nom. Anderson v. Green*, 513 U.S. 557 (1995). *See* Pet. App. 8-9, 26-27; *Green*, 811 F.Supp. at 519-23 (discussing and applying *Shapiro* and its progeny).

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. ...[A]s members of the same community, [we] must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

Id., 7 How. at 492 (Taney, C.J., dissenting). Similarly, in *Crandall v. Nevada*, 6 Wall. 35 (1867), the Court invalidated a tax upon persons leaving the State; *Paul v. Virginia*, 8 Wall. 168 (1868), spoke, albeit in dicta, of each citizen's "right of free ingress into other States, and egress from them," *id.* at 180; and *Edwards v. California*, 314 U.S. 160 (1941), struck down a statute making it a misdemeanor to bring an indigent person into the State. *See also Kent v. Dulles*, 357 U.S. 116, 125 (1958) (right to travel abroad is an aspect of "liberty" protected by the Fifth Amendment's Due Process Clause).

In virtually all of these cases, the Court derived its holdings from specific textual provisions of the Constitution. Thus, in the *Passenger Cases*, the majority Justices based their holdings on the Commerce Clause, *e.g.*, 7 How. at 408 (McLean, J.), while Chief Justice Taney looked to the Privileges and Immunities Clause of Article IV and other provisions. *Id.*, at 492 (Taney, C.J., dissenting). *Crandall v. Nevada* did not explicitly cite any constitutional provision, but its analysis, which focuses on the relationship between citizens and their government, *see id.*, 6 Wall. at 43-49, seems to have been based on the Privileges and Immunities Clause,[2] and was so regarded in later decisions of the Court. *E.g., Slaughter-House Cases*, 16 Wall. 36, 79

[2]Two Justices concurred in *Crandall's* result on Commerce Clause grounds. *Id.*, 6 Wall. at 49 (Clifford, J. concurring).

(1872). *Paul v. Virginia,* likewise looked to the Privileges and Immunities Clause, *id.*, 8 Wall. at 180; while *Edwards v. California* relied on the Commerce Clause. *Id.*, 310 U.S. at 168. *See also Shapiro,* 394 U.S. at 630 n.8 (citing these and other cases).

Shapiro broke sharply with these precedents in its assertion of a generic "right to travel interstate," *id.*, at 630, unconnected to any particular constitutional provision. In *Shapiro*, the Court considered welfare laws from two States and the District of Columbia, each of which denied welfare benefits to applicants who had not resided within the jurisdiction for at least one year. *Id.*, at 620. The Court first held that

> in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and *any classification which serves to penalize that right*, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.

Id., at 634 (emphasis added). Holding that the provisions in question — which resulted in a complete denial of benefits — did penalize the right to travel, the Court rejected every proffered justification of them, as reflecting governmental interests that were either insufficiently compelling or simply illegitimate. *Id.*, at 627. Accordingly, the Court held that the provisions violated the Fourteenth Amendment's Equal Protection Clause. *Ibid.* The Court emphasized, however, that it was not invalidating waiting-period or residence requirements *per se*. To the contrary, in other contexts:

> [s]uch requirements may promote compelling state interests on the one hand, or, on the other,

> *may not be penalties* upon the exercise of the constitutional right of interstate travel.

Id., at 638, n.21 (emphasis added).[3]

In contrast to its approach in earlier cases involving travel, the Court in *Shapiro* specifically declined to ground its analysis upon a constitutional text:

> We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that ... [it] "occupies a position fundamental to the concept of our Federal Union."

Id., at 630, *quoting United States v. Guest*, 383 U.S. 745, 757 (1966). Nor, in shaping the contours of the right it had just asserted, did the Court look to historical practice[4] or legal tradition.[5] To the contrary: while the Court acknowledged that

---

[3]The Court would later re-emphasize this point in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256-57 (1974).

[4]Durational residency requirements as a condition of receiving public assistance in English-speaking societies have been traced as far back as the Poor Law of 1535. 27 Hen. 8, ch. 25 (1535) (Eng.), *quoted in* W. Quigley, *Backwards Into the Future: How Welfare Changes in the Millenium Resemble English Poor Laws of the Middle Ages*, 9 Stan. L. & Pol'y Rev. 101, 103 n.36 (1998). For an unsympathetic recounting of these efforts, *see* S. Loffredo, *"If You Ain't Got the Do, Re, Mi": The Commerce Clause and State Residence Restrictions on Welfare*, 11 Yale L. & Pol'y Rev. 147, 154-57 (1993).

[5]When *Shapiro* was decided, 46 States had durational (continued...)

laws to discourage the influx of indigents into a given jurisdiction had been "prevalent" in American and English societies for "centuries," *Shapiro*, 394 U.S. at 628 n.7, the Court declared that this was a "constitutionally impermissible" purpose. *Id.*, at 631. According to the Court, a State may not "attempt to discourage those indigents who would enter the State solely in order to obtain larger benefits." *Ibid.* Such migrants, said the Court, "are surely ... no less deserving than [those] who move[] into a particular State in order to take advantage of its better educational facilities." *Id.*, at 632.

Shapiro was problematic in several respects. First, unlike earlier cases, *Shapiro* not only failed to ground its analysis in the text of the Constitution, but explicitly disavowed any need to do so; and it disregarded not only the constitutional text but the relevant history and tradition. Second, its dismissal of the States' asserted interest — discouraging those who would migrate in search of larger benefits — was supported only by what seemed raw policy choices about who was and was not "deserving." Finally, while it emphasized that not all durational residency requirements "penalized" travel, it gave no further guidance about what would or would not constitute a "penalty."

All of this gave *Shapiro's* analysis an indeterminate, open-ended quality, which in turn led to the criticism that *Shapiro's* approach simply cloaked value judgments of a kind more properly left to elected officials. Justice Harlan, writing in dissent in *Shapiro*, demonstrated that the result the Court had reached could not be supported by any of the constitutional provisions which might conceivably bear on the case, *id.* at 666-

---

[5](...continued)
residency requirements. *Id.*, 394 U.S. at 676 & n.36 (Harlan, J., dissenting).

77, and remarked that he knew of "nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection...." *Id.*, at 662 (Harlan, J., dissenting). Chief Justice Warren agreed: "The era is long past when this Court under the rubric of due process has reviewed the wisdom of ... congressional decision[s]." *Id.*, at 654 (Warren, C.J., dissenting).

Later cases added little of substance to *Shapiro's* analysis, and amounted to little more than an ad hoc list of provisions which, in the Court's judgment, did or did not violate the "right to travel." *See, e.g., Memorial Hospital v. Maricopa County, supra* (one-year residence requirement as condition for receiving free non-emergency medical care violates right to travel); *Sosna v. Iowa*, 419 U.S. 393 (1975) (one-year residence requirement as condition for receiving divorce does not violate right to travel); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (plurality) (veterans' preference for those who entered armed services while State residents violates right to travel).

Shapiro thus continued to attract a drumbeat of criticism from within the Court. *E.g., Memorial Hospital v. Maricopa County*, 415 U.S. at 286 (Rehnquist, J., dissenting) ("the Court should observe its traditional respect for the State's allocation of its limited financial resources rather than unjustifiably imposing its own preferences"). In the most recent of the Court's right-to-travel decisions, the plurality opinion was still maintaining that "[t]he textual source of the constitutional right to travel ... has proved elusive.... [W]e have not felt impelled to locate this right definitively in any particular constitutional provision," *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion of Brennan, J.), while the dissenting Justices criticized that opinion's reliance on "some free-floating 'right to

migrate'...." *Id.*, at 918 (O'Connor, J., dissenting).

> It is unfortunate that the Court has once again failed to articulate and justify by reference to textual sources a single constitutional principle or analysis upon which it can rely in deciding cases such as this.
>
> * * * *
>
> [T]he plurality's right to travel analysis [threatens to] swallow all the traditional deference shown to state economic and social regulation

Id., at 920, 925 (O'Connor, J., dissenting).

Outside the Court as well, *Shapiro* has continued to be controversial: scholars have found it lacking in coherence[6]; while lower courts have complained that its analysis is difficult to apply and that its results are sometimes incongruous. *See* Br. of Commonwealth of Pennsylvania, et al., Amicus Curiae in Support of Petition for Certiorari at 11-12 (filed August 19, 1998) (collecting cases).

---

[6]*See* T. Zubler, *The Right to Migrate and Welfare Reform: Time for* Shapiro v. Thompson *to Take a Hike*, 31 Val. U. L. R. 893 (1997) ("doctrinal mess"); K. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. R. 1414, 1435 (1989) ("difficult to grasp"); T. McCoy, *Recent Equal Protection Decisions — Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 Vand. L. R. 987 (1975) ("logically defective").

B. *Shapiro's* approach has been undermined by later decisions.

Meanwhile, *Shapiro's* approach has long been left behind by the rest of the Court's jurisprudence.[7] In contrast to *Shapiro's* insistence that there was "no occasion to ascribe the source of this right ... to a particular constitutional provision," *id.*, at 630, the Court in more recent years has repeatedly emphasized the importance of grounding constitutional analysis in the appropriate constitutional text. Thus, in *Graham v. Connor*, 490 U.S. 386 (1989), involving a claim of excessive force against police officers, the Court said:

> We reject this notion that all excessive force claims ... are governed by a single generic standard.... In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed.... "The first inquiry in any § 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged."

Id., at 393-94, *quoting Baker v. McCollan*, 443 U.S. 137, 140 (1979) (bracketed matter the Court's). *Cf. Graham*, 490 U.S. at 394-95 (claim of excessive force against free citizen analyzed under Fourth Amendment rather than under substantive due process), *with Whitley v. Albers*, 475 U.S. 312, 318-26 (1986) (claim of excessive force against convicted prisoner analyzed under Eighth Amendment). "Where a particular Amendment

---

[7]As one commentator who supports the result in *Shapiro* puts it, "[n]ot surprisingly in light of these [doctrinal] difficulties," *Shapiro* and similar cases "have left a limited legacy." K. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. R. at 1436-37.

'provides an explicit textual source of constitutional protection' against a particular sort of governmental behavior, "that Amendment, not the more generalized notion of substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (plurality opinion), *quoting Graham*, 490 U.S. at 395 (arrest without probable cause analyzed under Fourth Amendment rather than under substantive due process); *Albright*, 510 U.S. at 281 (Kennedy, J., concurring) (same).

Conversely, the Court has repeatedly expressed its "reluctan[ce] to expand the concept of substantive due process," precisely because "guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). And when the Court has resorted to substantive due process, it has "required a 'careful description' of the asserted fundamental liberty interest," and has been guided by "[o]ur Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, —, 117 S.Ct. 2258, 2268 (1997), *quoting Reno v. Flores*, 507 U.S. 292, 302 (1993). The Court has thus thoroughly repudiated *Shapiro's* approach to constitutional adjudication.

Shapiro's legacy has been similarly limited even in the specific area of social welfare legislation, where the Court has declined to extend *Shapiro's* "penalty" approach, and its accompanying strict scrutiny, even to situations that seem quite similar. Instead, the Court has consistently deferred to legislative choices in these areas, even where those choices might be characterized as "penalizing" the exercise of fundamental rights, and over dissents which specifically invoked *Shapiro* or its progeny. *Dandridge v. Williams*, 397 U.S. 471 (1970), for example, was decided the very Term after *Shapiro*. *Dandridge* upheld Maryland's upper limit on AFDC grants regardless of

family size, *id.*, at 483-87, against a claim that this limit "penalized" the exercise of the fundamental right to procreate. *Id.*, at 521-23 (Marshall, J., dissenting) (citing *Shapiro*). *Accord Maher v. Roe*, 432 U.S. 464 (1977) (state may deny payment for nontherapeutic abortions even though it pays for childbearing); *id.*, at 488 (Marshall, J., dissenting) (citing *Shapiro* and progeny); *Harris v. McRae*, 448 U.S. 297 (1980) (federal government may do the same); *id.*, at 335 (Brennan, J., dissenting) (citing *Shapiro* and progeny); *Lyng v. Int. Union, United Auto., Aerospace and Agricultural Implement Workers of America*, 485 U.S. 360 (1988) (upholding denial of food stamps to striking households); *id.*, at 375 (Marshall, J., dissenting) (citing cases following *Shapiro*).

Thus, the fear that *Shapiro's* approach would "swallow all the traditional deference shown to state economic and social regulation," *Attorney General of New York v. Soto-Lopez*, 476 U.S. at 925 (O'Connor, J., dissenting), has not been realized, but only because *Shapiro* itself has been largely bypassed by later cases. In doctrinal terms, *Shapiro* can now be seen not as seminal, but as an isolated anomaly, out of harmony with what came both before and after. This is an opportune time to correct it because, as we now discuss, *Shapiro*, while narrowly cabined, is neither dead nor harmless.

II. *Shapiro* Continues to Have Deleterious Effects on Government's Efforts to Attack Difficult Social Problems, Especially the Reform of Welfare.

In this Court, time may have passed *Shapiro* by, but it continues to work its mischief in the lower courts, mostly, but not only, in the welfare area. Only two months ago, the Third Circuit became the latest court to invoke *Shapiro* to strike down a two-tier residency statute similar to California's, remarking in

a case from Pennsylvania that:

> We are mindful ... that the opinions in several Supreme Court cases decided since *Shapiro* and *Maricopa County* may call into question the vitality of strict scrutiny review of laws that burden the fundamental right to interstate travel and migration.

Maldonado v. Houstoun, 157 F.3d 179, 1998 WL 569359 (3d. Cir. 1998) at *10. Nevertheless, the Court of Appeals felt bound to apply *Shapiro*, leaving to this Court "'the prerogative of overruling its own decisions.'" *Ibid, quoting Agostini v. Felton*, 521 U.S. 203, —, 117 S.Ct. 1997, 2017 (1997).

Other courts have done the same. Twelve States have so far adopted two-tier residency requirements in response to Congress' invitation,[8] and seven, counting California's and Pennsylvania's, have already been preliminarily or permanently enjoined. *See Hicks v. Peters*, 10 F.Supp.2d 1003 (N.D. Ill. 1998); *Westenfelder v. Ferguson*, 998 F.Supp. 146 (D. R.I. 1998) (granting preliminary injunction), *appeal docketed*, No. 98-1431 (1st Cir. May 14, 1998); *Ruffin v. Quasim*, No. C97-5767 FDB (W.D. Wash. Feb. 6, 1998) (granting preliminary injunction); *Sanchez v. Department of Human Services*, 314 N.J. Super. 11, 713 A.2d 1056 (1998); *Davis v. Doth*, No. 62-C6-97-010231 (Minn. St. Dist. Ct. July 31, 1998), *appeal filed* (Minn. Ct. App. Nov. 3, 1998).

In the Personal Responsibility Act, Congress authorized

[8]*See* Br. of Commonwealth of Pennsylvania, et al., Amicus Curiae in Support of Petition for Certiorari, at 6 n.2 (filed August 19, 1998) (listing state provisions).

the States to adopt two-tier residency schemes because, in Congress' judgment, the former welfare system was a "failure" which could best be reformed by

> giv[ing] States the freedom to innovate in developing income support programs for welfare families that encourage personal responsibility and move welfare recipients into the work force.

H.R. Rep. No. 651, 104th Cong., 2nd Sess. (1996), p. 3, 5. *See* F. Buckley & M. Brinig, *Welfare Magnets: The Race to the Top*, 5 Sup. Ct. Econ. Rev. 141, 150-51 (1997) (arguing that state experimentation will promote identification of optimal welfare policies). In the wake of the Personal Responsibility Act, proposals for state innovation abounded:

> Florida proposes to cut payments for additional children born to welfare mothers; Connecticut and Oregon will subsidize the wages of working welfare recipients; Michigan will sponsor a mentoring program with ties to a religious group; Kentucky will pay moving expenses for those wishing to relocate to work; Arkansas might pay a cash bonus to those who find a job; and Maine will ask caseworkers to make home visits.

Id., p. 151

Congress permitted States to adopt two-tier residency policies in order to promote this innovation, by removing State fears that innovative policies, especially those which involve higher benefits, would attract migrants. "[R]esearch shows that some families move across State lines to maximize welfare benefits. ...States that want to pay higher benefits should not be

deterred from doing so by the fear that they will attract large numbers of recipients from bordering States."[9] H.R. Rep. No. 651, 104th Cong., 2nd Sess. (1996), p. 1337.

Minnesota illustrates Congress' concerns. Minnesota has long focused its reform efforts on getting people not just off welfare, but out of poverty. Its effort is embodied in the Minnesota Family Investment Program (MFIP), which places a heavy emphasis not just on cash assistance, but on child care, employment and training, and has a proven track record of success.[10] *See* Minn. Stat. Ann., §§ 256J.01 *et seq.*

Minnesota has made a significant financial commitment to the MFIP. State appropriations for child care assistance (exclusive of federal funds) have risen from $34.5 million in fiscal year 1996 to $115.6 million in fiscal year 1999, and state funds for employment and training programs increased by $26 million for the 1998-99 biennium. Minn. Laws 1997, c. 162, art. 4, § 3; *id.*, c. 203, art. 1 and 12. In addition, Minnesota's cash assistance levels are among the highest in the Nation, and it

---

[9]*See* F. Buckley & M. Brinig, *Welfare Magnets: The Race to the Top*, 5 Sup. Ct. Econ. Rev. at 152, 162 (citing evidence that differential welfare payments influence migration flows); P. Peterson, *Devolution's Price*, 14 Yale L. & Pol'y Rev. 111, 116-17 (1996) (same).

[10]The MFIP began as a pilot program in the late 1980's. After 18 months, 52% of MFIP single parents were employed, compared to 38% of single parents receiving conventional AFDC, and 16% fewer families were in poverty. Manpower Demonstration Research Corp., "Making Welfare Work and Pay: Implementation and 18-Month Impacts of the Minnesota Family Investment Program, p. ES 6-8 (October 1997).

allows recipients to continue to receive benefits for the maximum time — 60 months — allowed by federal law. Minn. Stat. Ann. § 256J.42 (Supp. 1997); *see* 42 U.S.C. § 608(a)(7).

But Minnesota's ability to achieve its goals will be seriously impaired if its innovative and generous program attracts significant migration into the State by families seeking higher welfare benefits. The result, the legislature feared, would likely be "significant reductions in welfare benefits." Minn. Laws 1997, c. 85, art. 1, § 64, subd. 1(10). Minnesota therefore moved to "make welfare benefits a neutral factor in a family's decision to move to Minnesota, which is required for the state to continue its commitment to reform its welfare system and to provide meaningful assistance for needy Minnesota families." *Id.*, subd. 1(8).

Minnesota thus, like many other States, adopted a two-tier residency requirement, only, like other States, to see it enjoined by a court relying on *Shapiro. Davis v. Doth, supra. Shapiro* is thus discouraging the State experimentation which is at the heart of the national effort to reform welfare, as one court after another strikes down two-tier residence schemes.

Worse, *Shapiro's* regime has been associated by some with a so-called "race to the bottom" in which each State in turn *cuts* benefits in order to avoid becoming a "magnet" for welfare recipients. P. Peterson, *Devolution's Price*, 14 Yale L. & Pol'y Rev. 111, 117 (1996).

> The mean benefit paid to a family in the average state climbed from $306 in 1940 to $605 in 1970 (calculated in 1970 dollars). This steady increase was made possible by both steady economic growth and the fact that each state could set its

> policies without worrying too much about what its neighbors were doing.
>
> State AFDC policies began to change around 1970 [the year after *Shapiro* was decided]. ... By 1975, the mean cash benefit in the average state had slipped to $512; by 1985, it had fallen to $393; and by 1993, it had reached its postwar nadir of $349.

Id., at 116. Others disagree. *See* F. Buckley & M. Brinig, *Welfare Magnets: The Race to the Top*, 5 Sup. Ct. Econ. Rev. at 159, 176 (finding little evidence of a "race to the bottom"). Whoever is right, it seems evident that an area so fraught with the potential for unintended consequences demands far more flexibility, and far more deference to the judgment of legislators, than *Shapiro* permits.

In addition, *Shapiro* has surfaced from time to time in other areas, fueling attacks in the lower courts, sometimes successful, on attempts to curb juvenile crime and other societal ills. *See, e.g., City of Chicago v. Morales*, 687 N.E.2d 53, 65 (Ill. 1997), *cert. granted*, 118 S.Ct. 1510 (1998) (striking down gang loitering ordinance); *Nunez v. City of San Diego*, 114 F.3d 935, 944-46 (9th Cir. 1997) (striking down juvenile curfew ordinance); *Lutz v. City of York*, 899 F.2d 255, 258-71 (3d Cir. 1990) (rejecting challenge to anti-cruising ordinance); *Townes v. City of St. Louis*, 949 F.Supp. 731, 734 (E.D. Mo. 1996) (rejecting challenge to ordinance blocking street to vehicles).

Shapiro will not be a dead letter until this Court overrules it. The Court should take this opportunity to remove its distorting influence from our jurisprudence.

III. Considerations of Stare Decisis Do Not Weigh Against Overruling *Shapiro*.

The doctrine of *stare decisis* arises out of the recognition that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. *See* B.Cardozo, *The Nature of the Judicial Process* 149 (1921). Nevertheless, *stare decisis* "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). While respect for an issue previously decided is a necessity in our judicial system, *stare decisis* is not an "inexorable command" to adhere slavishly to prior decisions, particularly regarding issues of constitutional interpretation. *See Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405-411 (1932) (Brandeis, J. dissenting).

Considerations of *stare decisis* have the most force in cases concerning statutory interpretation, for if the Court misinterprets a statute the legislature can amend it to make its intentions clear. But where the Court decides a constitutional issue, the Court "to a great extent, place[s] the matter outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. at —, 117 S.Ct. at 2268. Since "correction through legislative action is practically impossible," *Coronado Oil & Gas Co.*, 285 U.S. at 407, *stare decisis* is at is weakest in constitutional cases like this one. *Agostini v. Felton*, 521 U.S. at —, 117 S.Ct. at 2016.

The time is ripe for the Court to review *Shapiro*, and *stare decisis* should not stand in the way. First, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent,'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), *quoting Smith v. Allwright*, 321 U.S. 649, 665 (1944), and as we have already explained, *Shapiro* is

both. *Shapiro* was an anomaly even when it was decided; since then, developments in the law have "left it behind as a mere survivor of obsolete constitutional thinking." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 857 (1992). Second, "*stare decisis* has special force when legislators or citizens have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hubbard v. United States*, 514 U.S. 695, 713 (1995). Here, however, reliance interests would seem to be "notably modest," *ibid*: not only is adherence to *Shapiro* doing more harm than good, *supra* at 13-18, but, as we now discuss, overruling *Shapiro* in favor of a return to more traditional modes of constitutional adjudication would sacrifice little real protection for individuals.

IV. Claims Involving Travel Should Be Measured by the Usual Tools of Constitutional Adjudication: Text and Tradition.

The *amici* States do not suggest that the Constitution does not protect travel; clearly it does. For over a century before *Shapiro*, the Court vindicated claims involving the right to travel, in decisions grounded in the text of the Constitution. *See supra* at 4-6.

The dormant Commerce Clause, for example, obviously offers powerful protection against any attempt by a State to fence itself off from the rest of the Nation, or to discriminate against those who come from other States as either migrants or travelers. *E.g., Edwards v. California, supra; Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, —, 117 S.Ct. 1590, 1596 (1997) (Commerce Clause protects summer camp whose customers come from out of state, citing *Edwards*).

Congress, however, may authorize the States to do what the Commerce Clause otherwise forbids, thus providing a measure of flexibility which is especially valuable in a case such as is now before the Court. Congress can identify and accommodate competing interests — the burden on interstate migration versus the need to encourage innovation and reform, for example — in a way which the relative rigor of constitutional doctrine cannot.

The Court has encountered this situation before. In *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), the Court considered a State's attempt to require an out-of-state mail-order house to collect a use tax on goods purchased for use within the State. The Court held that, unless the mail-order house had some physical presence within the State, such attempts violated both the Due Process Clause and the dormant Commerce Clause. A quarter of a century later, in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court overruled the due process aspect of *National Bellas Hess* because it had been "superseded by developments in the law of due process." 504 U.S. at 308. The Court reaffirmed, however, *National Bellas Hess'* holding on the Commerce Clause, a decision

> made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.

504 U.S. at 318.

Other specific constitutional provisions — the Privileges

and Immunities Clauses, and even the Fourth Amendment's prohibition against arrests without probable cause — each, in its appropriate sphere, but also subject to its appropriate limits, may come into play to protect the right to travel in a given case. Beyond these specific provisions, the right to travel is undoubtedly an aspect of the "liberty" protected by the Due Process Clause of the Fifth — and presumably, the Fourteenth — Amendment, *Kent v. Dulles, supra*, but subject to governmental regulation "if the provision is rationally based." *Califano v. Azavorian*, 439 U.S. 170, 178 (1978) (upholding limitation on Social Security benefits against right-to-travel-abroad challenge, citing *Dandridge v. Williams, supra*).

The *amici* have no quarrel with any of this. But they do submit that the time has come to abandon *Shapiro's* ill-conceived attempt to construct a generic, free-floating "right to travel," and to abandon as well its dismissal of legitimate governmental interests by simple *ipse dixit*.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals.

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

JOHN G. KNORR, III
Chief Deputy Attorney General
Counsel of Record

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1144

November 10, 1998 — COUNSEL FOR AMICI STATES